

No. 501

FILED
OCT 12 1940

CHARLES ELMORE GROPLE
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

CAP ANDREW TILLES,	} Petitioner,
v.	
COMMISSIONER OF INTERNAL REVENUE,	

PETITION FOR WRIT OF CERTIORARI
To the Circuit Court of Appeals for the Eighth Circuit
and
BRIEF IN SUPPORT OF PETITION.

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IN THE
SUPREME COURT OF THE UNITED STATES.

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CAP ANDREW TILLES,		Petitioner,
v.		
COMMISSIONER OF INTERNAL REVENUE,		Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Eighth Circuit.

Comes now Cap Andrew Tilles and prays the Court that it issue its writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in Cause No. 11,490, being a petition to review the decision of the United States Board of Tax Appeals, in which the Eighth Circuit inadvertently failed to correctly apply the principles involved in *Douglas v. Willcuts*, 296 U. S. 1.

The judgment of the Circuit Court of Appeals was entered on July 24, 1940 (Record p. 80).

Petition for rehearing was denied on September 4, 1940 (Record p. 91).

Stay of mandate for thirty days to file petition for certiorari granted September 17, 1940 (Record p. 93).

The opinion of the Court of Appeals (Record p. 63).

STATEMENT OF THE CASE.

In 1908 Mrs. Tilles sued petitioner, Mr. C. A. Tilles, of the City of St. Louis, in the Circuit Court of the City of St. Louis, State of Missouri, for divorce.

While the suit was pending, as a result of negotiations between the respective parties and **their lawyers**, a pre-divorce settlement was executed. Under this agreement certain securities which Mr. Tilles had given his wife were to be transferred to him.

Subsequently Mrs. Tilles **dismissed** her petition and the parties resumed their marital relations. The predivorce settlement was **abandoned** and Mrs. Tilles **retained** title to her securities.

In 1909 Mr. Tilles filed divorce proceedings against Mrs. Tilles in the Circuit Court of the City of St. Louis. His wife by resuming marital relations with him had condoned all of petitioner's alleged offenses set out in Mrs. Tilles' petition for divorce filed in 1908, and **she had therefore no ground for cross bill against Mr. Tilles.**

After Mr. Tilles filed his suit he informed Mrs. Tilles that he was willing to provide for her future welfare and maintenance, **although he was the one suing for divorce.** Accordingly, Mr. Tilles and his wife, without consulting anyone, took the old agreement, altering it only in so far as was necessary to make it appear that he was the party getting the divorce, and then they signed it. At the time this agreement was entered into, and as a consideration for its execution, Mrs. Tilles **transferred title** to Mr. Tilles of the securities above mentioned.

The agreement (Trans. pp. 43 and 44) is appended at the end of this brief.

The instrument was **conditioned upon**, Mr. Tilles, securing a divorce, from Mrs. Tilles; and since under the Missouri law, in such an event, no obligation was imposed upon Mr. Tilles, to support his wife, the agreement, **on its face** was simply, a voluntary declaration, as what he would do, for Mrs. Tilles in the future. **On the face of the instrument** no consideration moved from the former Mrs. Tilles to Mr. Tilles. **She didn't agree to do anything or refrain from doing anything.**

The validity of the agreement, as a binding obligation upon Mr. Tilles, **rests solely** upon the transfer by Mrs. Tilles of her securities to Mr. Tilles; a financial transaction.

On June 10, 1909, the Circuit Court of the City of St. Louis granted Mr. Tilles an **absolute** decree of divorce. The agreement of May 12, 1909, **was not a part of the decree**, as the Circuit Court **lacked jurisdiction** to make any such order (*McIntyre v. McIntyre*, 80 Mo. 470), because under the statutes of Missouri a divorced wife was not entitled to any alimony (Section 1358, R. S. Mo. 1929; Section 2378, R. S. Mo. 1909) nor dower (Section 331, R. S. Mo. 1929; Section 359, R. S. Mo. 1909).

After the decree petitioner proceeded to carry out the agreement of May 12, 1909, and has done so continuously ever since, paying to his former wife \$400 monthly, or \$4,800 annually, which was at the rate of 4.8 per cent on \$100,000.00.

Within one week after Mr. Tilles secured his divorce the former Mrs. Tilles remarried (*Trans p. 38*). Thereafter she was not entitled to any support from Mr. Tilles, even if she had secured the divorce. *Nelson v. Nelson*, 282 Mo. 412.

If the predivorce agreement of May 12, 1909, was predicated upon Mr. Tilles' obligation imposed upon him by law to support Mrs. Tilles, then upon Mrs. Tilles' remarriage, there was a failure of consideration under the agreement,

because under the authority just cited there was no further obligation imposed by law of the State of Missouri upon Mr. Tilles to support his former wife.

The record shows that from time to time Mr. Tilles, whenever the securities deposited under the agreement of May 12, 1909, became depreciated in value, replaced them with good or better securities or collateral.

The record shows [Trans. p. 40, par. (e)] that the former Mrs. Tilles returned the annual payments of \$4,800 as her income and paid taxes on the same, the Commissioner of Internal Revenue having ruled (Trans. p. 54) that they were not chargeable against Mr. Tilles as income.

In 1931 and 1932 the Commissioner of Internal Revenue reversed the previous ruling and held that the \$4,800 annual payments were not deductible (top of p. 18 of Trans. and last par., p. 19, of Trans.). From this ruling petitioner took an appeal to the Board of Tax Appeals, and on September 16, 1938, the Board of Tax Appeals promulgated its opinion sustaining the Commissioner (Trans. p. 25). Under order of redetermination (Trans. p. 30) a deficiency was assessed against taxpayer for the year 1931 of \$75.18; none for 1932.

The Court of Appeals affirmed the ruling of the Board of Tax Appeals, holding that upon the facts set forth the rule, stated, in *Douglas v. Willcuts*, applied.

QUESTION PRESENTED.

Whether the \$400 monthly payment made under the agreement of May 12, 1909, constitutes income, taxable to petitioner or his former wife in the years 1931 and 1932, depends upon the following question:

Whether the agreement of May 12, 1909, constitutes a continuing obligation on petitioner imposed upon him **by law**, that is, his marital duty to support his wife, which could have been altered, amended or enforced by the Cir-

cuit Court of the City of St. Louis in 1931 and 1932 under its divorce jurisdiction, or whether the agreement constituted a **contractual** obligation between petitioner and his former wife, founded on a valuable consideration as distinguished from a marital consideration, being predicated solely upon her transfer to him of the securities owned by her and not resting upon petitioner's obligation to support her, growing out of his marital relations.

If the contract be the former, then *Douglas v. Willcuts* applies; if not, then Section 23 of the Revenue Act of 1929 (U. S. C. A., Title 26, Sec. 23, page 125) and Subsection (b) of Section 23 of the Revenue Act of 1932 (U. S. C. A., Title 26, Sec. 23, page 125) do.

REASON FOR THE ISSUANCE OF THE WRIT.

The decision of the Circuit Court of Appeals fails to correctly apply the principles in *Douglas v. Willcuts*, 296 U. S. 1.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

The opinion of the Circuit Court of Appeals is to be found on page 63 of the record.

The judgment of the Circuit Court of Appeals on petition to review was entered on July 24, 1940 (Record p. 80).

The petition for rehearing was denied on September 4, 1940 (Record p. 91).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED.

The question presented is stated in the petition.

STATEMENT.

The facts and the reason relied upon for the issuance of the writ appear in the petition.

ARGUMENT.

The Court of Appeals in its opinion held:

“The **pre-divorce** agreement of May 12, 1909, created a continuing, legal and **contractual** obligation on the part of the petitioner. This continuing, legal and **contractual** obligation was in effect during 1931. Under the principles laid down in *Douglas v. Willcuts*, 296 U. S. 1, the \$4800.00 used by the petitioner to satisfy that obligation during that year is taxable to him.”

Section 331, R. S. Mo. 1929 (same as Section 359, R. S. Mo. 1909), provides:

“Divorce, When and When Not a Bar.—If any woman be divorced from her husband, for the fault or misconduct of said husband, she shall not thereby lose her dower; but if the husband be divorced from the wife, for her fault or misconduct, she shall not be endowed.”

Section 1358, R. S. Mo. 1929 (same as Section 2378, R. S. Mo. 1909), provides:

“Divorce Affects Guilty Party, How.—In all cases of divorce from the bonds of matrimony, the guilty party shall forfeit all rights and claims under and by virtue of the marriage.”

This includes alimony. McIntire v. McIntire, 80 Mo. 470; Wade v. Wade, 229 S. W. 432; Rhoades v. Rhoades, 342 Mo. 934, l. c. 941.

In Missouri if a wife secures a divorce from her husband and alimony is allowed her, and she thereafter remarries, she is not entitled to further alimony after her remarriage. Nelson v. Nelson, 292 Mo. 412.

On the record, the **law** of Missouri imposed no obligation or duty upon Mr. Tilles (petitioner herein) as a **marital obligation** to support his former wife, in 1931 and 1932, and Douglas v. Willcuts therefore does not apply.

As we understand Douglas v. Willcuts, where there is a predivorce agreement under the terms of which a certain income is allotted to the wife by her husband because of his duty to support her and she thereafter secures a divorce from him, and the court in which the divorce is secured continues to have power and jurisdiction to alter, amend or enforce the predivorce agreement, the income derived by the wife under the predivorce agreement is but the payment by the husband of an obligation which the **law** con-

tinues to impose upon him, notwithstanding the divorce, and therefore the income paid the wife is but money used by the husband to discharge that obligation. The gist of the Douglas opinion is the **reserve power** in the Court **after the decree of divorce**, to **enforce** the husband's **continuing obligation to support his wife, by virtue of that duty imposed upon him by law**, notwithstanding and regardless of the predivorce agreement, not because of the **predivorce agreement**.

The predivorce agreement is but **security** for the obligation of the husband imposed by law. The predivorce agreement is not a contractual obligation **wholly disassociated** from the husband's obligation to support his wife imposed by law. So far as determining the question of income, the predivorce agreement is of no moment.

The Circuit Court of Appeals, we respectfully suggest, inadvertently failed to note the distinction, as we have just pointed out, between the predivorce agreement and the reserve power of the trial court in the divorce proceedings before it.

The Court of Appeals' opinion rests squarely upon the predivorce agreement as imposing an obligation upon Mr. Tilles to continue to support his former wife by payment of alimony in 1931 and 1932 and **not the reserve power** in the Circuit Court of the City of St. Louis to **compel, by order** in 1931 and 1932, Mr. Tilles to pay his former wife alimony.

The enforcement of the agreement of May 12, 1909, in the present case doesn't rest and could not rest upon any obligation imposed under the **law** of Missouri for Mr. Tilles to support his former wife as a result of their marital relations in 1931 and 1932, for the Circuit Court of the City of St. Louis had no jurisdiction or authority to make or enforce any such order upon Mr. Tilles.

The Court of Appeals in its opinion affirming the ruling of the Board of Tax Appeals held as follows:

“The pre-divorce agreement of May 12, 1909, created a continuing, legal and contractual obligation on the part of petitioner. This continuing, legal and contractual obligation was in effect during 1931. Under the principles laid down in *Douglas v. Willcuts*, 296 U. S. 1, the \$4800.00 used by petitioner to satisfy the obligation during that year is taxable to him.”

In the foregoing pronouncement we respectfully suggest that the Court of Appeals is in error. *Douglas v. Willcuts* does not hold, that where there is a predivorce agreement in favor of the wife and the wife secures a divorce and thereafter remarries and the laws of the state in which the divorce is secured, upon such remarriage, absolves the husband from paying further alimony to the wife, that the predivorce agreement constitutes a continuing, binding, contractual obligation upon the husband.

Neither does *Douglas v. Willcuts* hold that where a husband sues his wife for divorce and makes a predivorce agreement with his wife to pay her alimony, under the mistaken idea that such obligation is imposed upon him by the law of the state, when it is not, and the wife thereafter remarries, that the predivorce agreement under the law of the state in question constitutes a continuing and binding contractual obligation upon the husband.

Under the laws of the State of Missouri the agreement of May 12, 1909, could not in 1931 and 1932 have been enforced against Mr. Tilles, as a binding contractual obligation, predicated upon his duty to pay the former Mrs. Tilles alimony. The cases cited in the opinion of the Circuit Court of Appeals to the effect that a predivorce agreement can be enforced, after a divorce decree, are cases where the wife secured the divorce.

Petitioner has never denied and does not now deny that the agreement of May 12, 1909, was binding upon him. He considered it binding upon him because he received from

his wife valuable securities belonging to her and in exchange for which he agreed to pay her the \$4,800.00 per year (Trans., last par., p. 39). No principle laid down in *Douglas v. Willcuts* applies to any such agreement.

The agreement rests solely upon a financial consideration, and not upon Mr. Tilles' duty to pay his former wife alimony in 1931 and 1932.

The net result of the transaction of May 12, 1909, was that Mr. Tilles took Mrs. Tilles' securities and agreed to pay her \$100,000, during her lifetime, absolutely upon his death, and interest thereon at the rate of 4.8 per cent per annum until paid.

What Mrs. Tilles did was to exchange her securities for the financial responsibility of her former husband, together with the supporting securities deposited with the trust company, to secure performance of his agreement. So far as the marital relations were concerned, the agreement might have been made between a man and woman unmarried.

The point in the record is this: That since the agreement in 1931 and 1932 could not be supported by Mr. Tilles' obligation to support his wife as a result of the marital relation, but was and can be supported by a valuable consideration moving from Mr. Tilles to Mrs. Tilles, the case of *Douglas v. Willcuts* does not apply, but the following sections of 1928 and 1932 do, viz.:

Section 23 of the Revenue Act of 1929 (U. S. C. A., Title 26, Section 23, p. 125), which was effective for the year 1931, and which is as follows:

“In computing net income there shall be allowed as deductions:

“(b) **Interest.** All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and

originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.”

And under Subsection (b) of Section 23 of the Revenue Act of 1932 (U. S. C. A., Title 26, Section 23, p. 125), covering the year 1932, which is as follows:

“In computing net income there shall be allowed as deductions:

“(b) **Interest.** All interest paid or accrued within the taxable year on indebtedness, except (1) on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this title, or (2) on indebtedness incurred or continued in connection with the purchasing or carrying of an annuity.”

Viewing the transaction as a sale and purchase of the securities in question by Mr. Tilles for \$100,000, the agreement of May 12, 1909, was simply the equivalent of a promissory note payable on a fixed and determined date, with the obligation upon Mr. Tilles to pay interest monthly, at the rate of 4.8 per cent per annum.

Mr. Tilles had the option of paying \$100,000 to Mrs. Tilles at any time during his lifetime. The moment he did that all obligations ceased on his part, which, in and of itself, is conclusive that *Douglas v. Willcuts* does not apply.

The Court of Appeals' opinion rests squarely upon the contract or agreement of May 12, 1909, and Mr. Tilles' alleged obligations arising out of that contract. Whereas, the decision in the *Douglas* case rests not upon the pre-divorce agreement, but upon the husband's obligation imposed upon him **by law** to support or pay alimony to his wife during the taxable year in question.

The Court of Appeals fails to note the distinction that we have pointed out and therein fails to correctly apply the principles announced in *Douglas v. Willcuts*.

The correct application of the principles in *Douglas v. Willcuts* on this record, in the last analysis, depends upon the consideration which supports the contract or agreement of May 12, 1909. If the consideration which supported the contract in 1931 and 1932 was Mr. Tilles' obligation to support his former wife imposed upon him by law, then *Douglas v. Willcuts* applies. If the consideration which supported the legality of the contract and made it a continuing, contractual obligation upon Mr. Tilles in 1931 and 1932 were the securities that he received from Mrs. Tilles, then the principles laid down in *Douglas v. Willcuts* do not apply; the annual payments being but interest upon a financial debt owed by Mr. Tilles to his former wife and deductible under the Revenue Acts of 1928 and 1932.

The record shows that the parties themselves did not treat the annual payments as a discharge by petitioner of his marital obligations, because, if they were, petitioner's former wife would not have returned the annual payments as taxable income.

Respectfully submitted,

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APPENDIX.

The agreement is to be found on pages 43 and 44 of the transcript, and is as follows:

“St. Louis, Mo., May 12, 1909.

“Mrs. Corrine Tilles,

“In view of the fact that I have instituted a suit for divorce against you, and in order to avoid any adjudication by the Court of alimony in said case, **in the event** the Court should hold on the trial that I am entitled to such divorce, and in order to discharge my duty in the matter of providing you with means of support and proper maintenance: I hereby state that **if** the Court shall decree upon the hearing and trial of said cause, that I am entitled to such divorce, then I will in lieu and stead of permitting any judgment or decree for alimony against me, pay and secure to you the sum of Four Hundred Dollars (\$400.00) per month, during your natural life, and in the event that your mother should survive you, then to her the sum of One Hundred Dollars (\$100.00) per month, during her natural life. That to secure these payments, I will pledge stock in The New Memphis Jockey Club of par value of \$25,000 and also in the Douglas Park Jockey Club, of the par value of \$50,000; and also stock in the Detroit Racing Association, of the par value of \$40,000; and also stock in the Latonia Agricultural Association, of the par value of \$12,500; upon the express condition, however, that I shall have the option at any time during my life, of paying \$100,000.00 in cash to you, and being thereby released from any and all obligations and undertakings herein and hereby mentioned and set forth, or in case of my failure to exercise such option, and in case of my death leaving you surviving, then my executor shall pay to you the sum of \$100,000.00 and shall thereby be released, and my estate and heirs and representatives be released

from any and all covenants herein proposed, undertaken or assumed.

“I hereby expressly reserve the right, at any time during the existence of this agreement herein proposed, to sell any or all of the stock herein described or which may be pledged to secure such agreement, upon condition, that I shall substitute for such stocks, and pledge in the same manner, other stock, bonds or securities of equivalent value to that to be withdrawn.

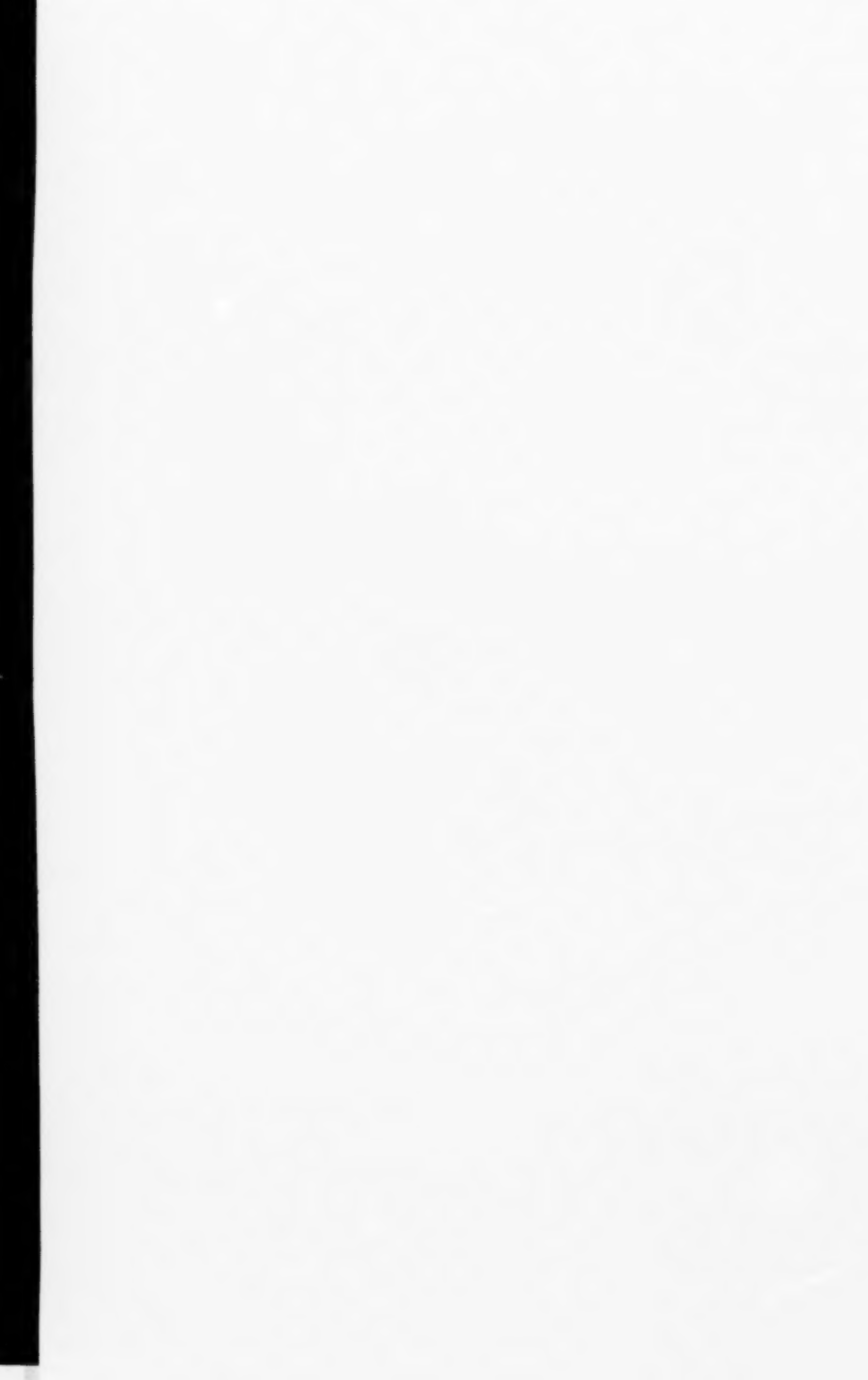
“I make this proposition and agreement solely in consideration of my marital duty, and to adjust any matter of alimony, and prevent the consideration of said matter of alimony by the Court in which my suit is pending, **in case** it should hold I am entitled to a decree for divorce.

“This 12th day of May, 1909.

(Signed) C. A. Tilles.

Accepted:

(Signed) Mrs. C. A. Tilles.”



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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 501

CAP ANDREW TILLES, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22-29) is reported in 38 B. T. A. 545. The opinion of the Circuit Court of Appeals (R. 62-76) is reported in 113 F. (2d) 907.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1940 (R. 76). A petition for a rehearing was denied on September 4, 1940 (R. 87). The petition for a writ of certiorari was filed on October 12, 1940. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner and his former wife entered into an agreement whereby petitioner agreed to pay her \$400 a month during the remainder of her life. The agreement further provided that petitioner should have the option of paying his wife \$100,000 in cash in release of his obligation to make the monthly payment, and that if petitioner's wife survived him petitioner's estate should pay her \$100,000 in release of the obligation. The question is whether petitioner's payments to his wife under this agreement are deductible from his gross income as interest paid on indebtedness.

STATUTES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on

for gain or profit, or gains or profits and income derived from any source whatever.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(b) *Interest*.—All interest paid or accrued within the taxable year on indebtedness, * * *.

These provisions also appear in the same sections of the Revenue Act of 1932, c. 209, 47 Stat. 169.

STATEMENT

The facts as stipulated (R. 39-52) may be summarized as follows:

In 1908 petitioner's wife, Mrs. Corinne L. Tilles, instituted suit for divorce against petitioner in the Circuit Court of the City of St. Louis, Missouri. Later in the same year she dismissed the suit (R. 39). The next year petitioner filed suit for divorce in the same court, and was granted an absolute divorce on June 10, 1909 (R. 39, 42).

During May 1909 petitioner and his wife entered into a written contract in the form of a letter, whereby petitioner agreed to pay his wife \$400 per month during her life (R. 43). The agreement reserved to petitioner the option of paying to his wife \$100,000 in cash in release of all other obligations under the contract, and also provided that if petitioner's wife survived him petitioner's estate

should pay her \$100,000 in release of such obligations. Other provisions of the contract called for the pledge of certain designated stocks to secure the promised payments (R. 43).

During each of the years 1931 and 1932 petitioner paid to his former wife the sum of \$4,800 under the terms of the agreement (R. 40). Petitioner claims the right to deduct these sums from his gross income. The Commissioner held these deductions improper and asserted deficiencies (R. 12). The Board of Tax Appeals (R. 25-27) and the Circuit Court of Appeals (R. 62, 76) both likewise held that the payments were not deductible.

ARGUMENT

1. Petitioner asserts that the court below misapplied *Douglas v. Willcuts*, 296 U. S. 1, for the reason that petitioner's payments to his wife were not in discharge of any obligation for her support imposed by law, but were made pursuant to a contract between petitioner and his wife. But, since petitioner himself received the moneys which he paid over to his wife, there is here no question whether income not actually received by petitioner may be attributed to him under the doctrine of *Douglas v. Willcuts*. The lower court's discussion of that and related decisions appears to be merely background for its holding, not challenged in the petition, that petitioner's pledge of stocks as se-

curity for his payments to his wife did not create a trust. See R. 72.

2. When petitioner agreed to pay his wife \$400 monthly, he retained an option to discharge that obligation by paying \$100,000 in a lump sum. And the agreement provided that if petitioner's wife survived him petitioner's estate should pay her \$100,000 in discharge of the obligation. Petitioner asserts that in view of these facts his agreement with his wife should be viewed as the equivalent of a promissory note obligating him to pay interest monthly at the rate of 4.8 percent per annum, and that his payments to his wife are therefore deductible as interest on indebtedness under Section 23 of the Revenue Acts of 1928 and 1932. This contention is manifestly insubstantial and petitioner cites no authority in support of it. In essence, petitioner is simply seeking a deduction on account of payments made by him in the nature of alimony. But Article 281 of Treasury Regulations 77, construing Section 24 (a) (1) of the Revenue Act of 1932, which forbids deductions in respect of "personal * * * expenses", specifically states: "Alimony and an allowance paid under a separation agreement are not deductible from gross income."

CONCLUSION

The decision below presents no conflict or question of general importance. The petition should therefore be denied.

Respectfully submitted.

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NOVEMBER 1940.

